Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 10, 1973. A timely petition for rehearing *en banc* on behalf of petitioner Simon was denied on June 8, 1973. The petition for writ of certiorari on behalf of Simon was filed on September 6, 1973, and the petition was granted by this Court on December 3, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

Fla. Stat. Ann. §25.031 and §25.032 (1961):

Supreme court authorized to receive and answer certificates as to state law from federal appellate courts

"The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

Same; rules and regulations

"The supreme court of this state is hereby authorized and empowered to collaborate with any and all other courts of last resort, of other states and of the United States, in the preparation and approval of uniform rules of court to make effective this and similar laws."

Fla. App. R. 4.61 (1967):

Certified questions from federal courts

"a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of law of this state to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this state.

c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the Clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 30 days after the filing of said certificate in the appellate court of this state having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 20 days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within 10 days thereafter.

h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits."

Question for Review

Whether the Second Circuit erred by deciding the significant and novel Florida law question presented by this case without reference to Florida authority when it could, by using Florida's certification procedure, have obtained an authoritative answer to that question from Florida's Supreme Court.

Statement of the Case

These shareholders' derivative suits were brought in the United States District Court for the Southern District of New York on behalf of Lum's, Inc., a Florida corporation engaged in the fast-food franchising business.* The sole basis for jurisdiction was diversity of citizenship. The District Court below ruled the controlling law to be that of Florida, where the derivative defendant Lum's was incorporated (52a-54a);** this finding was not challenged by the plaintiffs on appeal and was accepted by the Second Circuit (65a-66a).

The complaints in these cases allege that the defendant Melvin Chasen, in his capacity as Chief Executive Officer of Lum's, learned on or about January 5, 1970 that the

* Three actions were before the District Court below: *Schein* v. *Chasen, Gregorio* v. *Lum's* and *Gildenhorn* v. *Lum's*. The defendants, in addition to the derivative defendant Lum's, Inc., were Lum's chief executive officer, Melvin Chasen; the brokerage firm of Lehman Brothers and (in the *Schein* action only) one of its registered representatives, Benjamin Simon; Investors Diversified Services, Inc. ("IDS"), two IDS fund managers, Eugene Sit and James Jundt (in *Gregorio* and *Schein*) and (in *Schein* and *Gildenhorn*) two IDS mutual funds, Investors Variable Payment Fund and IDS New Dimensions Fund, Inc.

The *Gregorio* suit, originally brought in the Northern District of Illinois, was transferred to the Southern District of New York on consent and the complaint (originally brought on an altogether different theory) amended to plead a derivative claim similar to *Schein*. Petitioner Simon was not included as a defendant in the *Gregorio* suit because both he and plaintiff Gregorio are Illinois residents (*Gregorio* Amended Complaint ¶3, 24a), so that diversity would have been defeated if he had been joined. The plaintiffs in *Schein* are Maryland residents (*Schein* Complaint ¶1, 14a). The derivative defendant Lum's and its officer, Chasen, were in Florida; Lehman Brothers in New York, and the IDS defendants in Minnesota (*Schein* Complaint ¶¶1-11, 15a-16a).

** References with the suffix "a" are to the Appendix herein.

company's projected earnings for fiscal 1970 were being revised substantially downward from the estimate which had been previously announced to the public. It is claimed that Chasen, in a January 8 telephone call, imparted this information to Simon, a registered representative employed by Lehman Brothers, and that Simon the same day passed it on to an IDS portfolio manager, who in turn relayed it to a colleague. The next morning, January 9, the defendant IDS funds sold a total of 83,000 shares of Lum's stock at approximately $17.50 per share. Later that day, a Friday, news of the downward revision of Lum's earning projections was publicly announced. When trading resumed the following Monday, the opening price was $14.00 per share. (*Schein* Complaint ¶¶16-24, 17a-19a; *Gregorio* Amended Complaint ¶¶13-20, 27a-30a).

The *Schein* complaint asserts that Chasen, by disclosing confidential information concerning Lum's, breached the fiduciary duty he owed to that company, and that Simon, Lehman Brothers and the IDS defendants "aided and abetted" Chasen in his breach of duty by "[using] the aforesaid confidential information for their own personal profit." (*Schein* Complaint ¶¶16, 18, 25, 17a-20a). The *Schein* complaint demands that the defendants be held liable to Lum's for their "unlawful profits (including commissions)" and for "the damages it [Lum's] sustained thereby" (*Id.* at ¶25, 20a). The *Gregorio* complaint makes not even a conclusory allegation of damage to Lum's, but asserts that defendants "must account to Lum's, Inc. for the profits realized by them." (*Gregorio* Amended Complaint ¶22, 30a).

Notwithstanding the allegation in both complaints that Simon and Lehman Brothers "profited" by the conduct

complained of, it was established below by uncontradicted proof that the IDS sales of January 9, 1970 were not made through Lehman Brothers and that neither Simon nor Lehman Brothers received any commission or other profit in connection with those sales. (Simon Affidavit ¶3, 37a; Lisle Affidavit ¶2, 44a). The District Court accordingly found—and its finding is uncontested on this record—that the "broker-dealer defendants * * * did not profit by virtue of the sales" (55a).

On motions pursuant to Fed. R. Civ. P. 12(b) (6) to dismiss the complaints for failure to state a claim,* the District Court first rejected respondents' contention that New York law applied, concluding rather that the law of Florida controlled because

> "* * * Florida has the paramount interest in defining and enforcing fiduciary obligations owing to corporations incorporated and doing business within its borders" (53a).

Turning to Florida precedents, Judge Tyler found that Florida case law requires a derivative plaintiff to show damage to the corporation by reason of the alleged breach of trust: *Palma* v. *Zerbey,* 189 So. 2d 510, 511 (Fla. App. 1966), *cert. denied* 200 So. 2d 814 (Fla. 1967), and cases cited therein. The *Gregorio* complaint claimed no such damage and the *Schein* complaint's allegation of damage was wholly

* Motions by defendants Chasen, Sit and Jundt pursuant to Fed. R. Civ. P. 12(b) (2) to dismiss for lack of personal jurisdiction were granted in the District Court and not appealed. A similar motion by petitioner Simon was not passed upon by the District Court, evidently because dismissal was ordered as to Simon on the alternative ground, pursuant to Fed. R. Civ. P. 12(b) (6), of failure to state a claim upon which relief could be granted. No appeal was taken as to any party from the District Court's dismissal of the *Gildenhorn* suit.

conclusory. The District Court found no Florida authority, however, as to the degree of specificity required in pleading corporate damage. For that reason, and in light of the "possibility" that Florida might follow the New York decision in *Diamond* v. *Oreamuno,* 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969), which dispensed altogether with the damage requirement, the District Court went on to consider whether the complaints were sufficient even under the *Diamond* rule (54a).

Diamond v. *Oreamuno* was a derivative suit against a company's Chairman and President alleging that they had learned, by virtue of their corporate positions, of a decrease in the company's earnings and had sold stock of the company before news of the decrease became public. At the outset of the New York Court of Appeals' opinion, Chief Judge Fuld stated that "the question presented—one of first impression in this court—is whether *officers and directors* may be accountable to their corporation for gains realized by them from transactions in the company's stock as a result of their use of material inside information." 24 N.Y.2d at 496, 248 N.E.2d at 911, 301 N.Y.S.2d at 79 (emphasis added). In holding that such liability might be imposed, the Court of Appeals reasoned that confidential information about a company is its property and cannot be appropriated by those who owe it a fiduciary duty, regardless of whether the corporation is damaged by the fiduciary's breach:

> "In our opinion, there can be no justification for permitting officers and directors, such as the defendants, to retain for themselves profits which, it is alleged, they derived solely from exploiting information

> gained by virtue of their inside position as corporate officials." 24 N.Y.2d at 498-99, 248 N.E.2d at 912, 301 N.Y.S.2d at 81.

Since the liability imposed in *Diamond* was predicated on a breach of fiduciary duty, the District Court held that the *Diamond* rule did not extend to third parties such as Simon, Lehman Brothers and IDS, who were not fiduciaries of Lum's and whose conduct could not constitute a breach of duty owed to that company. Moreover, since the liability found in *Diamond* was a liability to account for improperly obtained profits, dismissal of the instant complaints was required as to Simon and Lehman Brothers because these defendants, as the District Court found, had made no profits and had nothing for which to account. Noting that the New York Court of Appeals in *Diamond* had affirmed the dismissal of that suit as to other officers of the company alleged to have aided and abetted the primary defendants by concealing their activities, the District Court concluded that the unique *Diamond* rule did not reach the present case:

> "In view of the fact that the New York Court of Appeals could not bring itself to find liability for intercorporate conspirators, I fail to perceive how this court could extend *Diamond* to cover extra-corporate conspirators and tippees. Accordingly, I conclude that with regard to all defendants save Chasen, the complaints herein fail to state a claim for which relief can be granted." (56a)

The Court of Appeals for the Second Circuit, with Judge Kaufman dissenting, reversed. Saying that its "foray" into Florida law disclosed that "the Florida court has never faced the precise issues which are present in this action," the majority below readily turned for "persuasive author-

ity" to the New York decision in *Diamond* (66a). Having assumed that a Florida court would decide this case under *Diamond,* the court then assumed that Florida would extend the first-impression *Diamond* holding to reach the non-fiduciary, non-profiting defendants in this case because "*Diamond*, the law of the jurisdiction in which the New York Stock Exchange is seated, has the prophylactic effect of providing a disincentive to insider trading" (69a), and because the court thought a state remedy necessary to prevent "immunized outsiders" from escaping liability in situations where "federal private and governmental Rule 10b-5 actions are impractical" (69a).*

The Second Circuit's opinion, though replete with citations of federal decisions from several jurisdictions, many of them arising under the federal securities acts, touches on Florida law at only two points. Reasoning that a "tippee" who acquires "inside" information thereby becomes invested with a duty to those investors who are damaged by his conduct, as in *SEC* v. *Texas Gulf Sulphur Co.,* 446 F.2d 1301 (2d Cir. 1971), the court concluded that a stranger who acquires confidential information about a company becomes *ipso facto* that company's fiduciary as well (69a-71a). To support this novel concept, the Court of Appeals cited the Florida case of *Quinn* v. *Phipps,* 93 Fla. 805, 113 So. 419 (1927) for the proposition that Florida does not limit fiduciary liability to "technical fiduciaries" (70a). The issue in *Quinn,* however, was whether a real estate broker who negotiated for himself the purchase of property could be

* This was not such a situation. Both an SEC enforcement action, *SEC* v. *Lum's, Inc.,* 70 Civ. 1734 (S.D.N.Y., filed December 7, 1970) and a stockholder's class action for damages, *Sanders* v. *Lum's, Inc.,* 71 Civ. 5331 (S.D.N.Y., filed March 12, 1971) were pending when this case was heard by the Court of Appeals.

compelled to account to the client on whose behalf he was supposed to have acted: a finding that a fiduciary relationship existed was, of course, the basis on which liability was imposed. *Quinn* was the sole Florida authority adduced to support the majority's result. On the other critical question of whether Florida law permits a corporation to recover regardless of whether it has sustained damage, the court disposed of the roadblock case of *Palma* v. *Zerbey,* 189 So. 2d 510 (Fla. App. 1966), *cert. denied* 200 So. 2d 814 (Fla. 1967), in a footnote as "* * * a one paragraph per curiam opinion of a lower Florida court, the Florida District Court of Appeals which, inasmuch as it fails to provide a discussion of the issues, we find to be totally unpersuasive" (72a, n.9).

Judge Kaufman, in dissent, agreed with the District Court that the majority's expansive reading of *Diamond* was incorrect as a matter of New York law and that the rationale of *Diamond* has no application to persons such as Simon and Lehman Brothers, who owed no fiduciary duty to the corporation and who had no profits for which to account. Noting the absence of authority in Florida or any other state to support the majority's assumption that Florida would "give an unprecedented expansive reading" to *Diamond,* Judge Kaufman said that the court "* * * exceeds its authority by substituting its own view of what state law ought to be, for what the state law actually is" (80a). Judge Kaufman concluded:

> "Moreover, since the outcome of this case turns, ultimately, upon Florida law, I fail to comprehend why my brothers refuse to utilize Florida's certified question statute, Fla. Stat. Ann. §25.031. This enlightened law provides for certification to the Florida Supreme Court by a federal appellate court of an un-

resolved question of Florida law which is determinative of a case before it and on which there are no clear, controlling Florida Supreme Court precedents * * * The uncertainty inherent in the majority's speculation over what the Florida courts would decide if faced with this novel question of tippee liability under state common law fiduciary principles in a stockholders' derivative action would be dispelled authoritatively and finally." (80a-81a) (footnote omitted).

Summary of Argument

This case should have been decided under Florida law. It was not. Judge Kaufman pointed out in his dissent below that the "* * * view that a tippee is cloaked with state law fiduciary obligations to the corporation whose shares he trades is an unknown and untenable legal concept" (79a). Decided under cover of darkness as to Florida law, the Second Circuit's result in this case is in fact an imaginative piece of legislation enacted to plug what the majority below perceived to be a possible loophole in the federal securities acts. As a recent note on this case says, "*Schein* has created, in effect, a new duty owed by outsiders to the corporation" and "should spawn a new breed of inside information cases." Note, 42 FORDHAM L. REV. 211, 224, 223 (1973).

Before "spawning a new breed of inside information cases", the Second Circuit should have stopped to certify the question presented by this case to Florida's Supreme Court, as the Fifth Circuit would have done if this case had been before it. With certification, the Second Circuit's deference to Florida's law and policy would have

been real instead of feigned. With certification, the court's decision, instead of resting on unsupported speculation as to how Florida would view the case, would have rested on an authoritative Florida pronouncement. With certification, the litigants here would have been assured the benefit of the same rule which would have been applied in a Florida state court but for the accident of federal jurisdiction, and litigants in future cases would have known either that such claims were not maintainable or that they could just as well be asserted in Florida's courts as in the federal courts of the Second Circuit. With certification, the goal of uniformity laid down by *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938), could have been realized without the delay, expense or impairment of federal jurisdiction associated with abstention. There was much to gain by certification in this case and nothing to lose: the Second Circuit erred by not making use of the procedure here.

ARGUMENT

I

In this case, where the Second Circuit could find no basis in Florida law for its decision, it was error to disregard the certification procedure by which an authoritative answer might have been supplied.

As this Court said in *Angel* v. *Bullington,* 330 U.S. 183, 191 (1947), "The essence of diversity jurisdiction is that a federal court enforces State law and State policy." The federal court's function in such a case "* * * is to ascertain what the state law is, not what it ought to be", *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.,* 313 U.S. 487, 497 (1941). All available sources of state law must be ex-

plored, for the federal court is not free to choose its own rule of decision merely because the state's highest court has not spoken:

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from the prior decisions of the federal courts." *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940).

See also Bernhardt v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956); *King* v. *Order of United Commercial Travelers of America*, 333 U.S. 153 (1948).

The Second Circuit's task of finding and applying Florida law in this case was a difficult one, because the question presented here was truly novel. Neither Florida's courts nor the courts of any other state have ever been called upon to decide whether a corporation whose stock is traded on the basis of non-public information has a right of action against third parties such as Simon and Lehman Brothers who were not its fiduciaries and who did not profit from the transaction. It was not necessary, however, for the Second Circuit either to speculate as to how Florida's courts would decide this question or to prescribe a rule of its own: an authoritative answer could have been obtained by using Florida's procedure for the certification to her Supreme Court of unresolved questions of Florida law arising in the federal court.* By adopting that procedure Florida offered

* FLA. STAT. ANN. §§25.031-25.032 (1961); FLA. APP. R. 4.61 (1967), set forth in full under "Statutory Provisions Involved" *supra*.

the federal appellate courts an available source of data, *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 226 (1940), as to its law. Since it was unable to ascertain Florida law by any other means, the Second Circuit should have used that procedure here.

A. The Customary Methods of Finding State Law Either Were Not Used in This Case or Were Inadequate to Supply a Reasonable Basis for Determining Florida Law.

Having ascertained from its "foray" into Florida law that Florida's Supreme Court has never passed upon the "precise issues" presented by this case (66a), the Second Circuit did not pause, as a Florida court would have done, to look for guidance in Florida authorities as to Florida's treatment of fiduciary relationships in other situations, the circumstances in which its courts recognize a new common-law right in the absence of legislative action, their definition of "aiding and abetting", its policy with respect to derivative litigation, and the views of Florida's courts and Legislature in the securities field. Instead, the Court of Appeals turned to more familiar territory, the New York Court of Appeals' decision in *Diamond* v. *Oreamuno*, and stretched *Diamond* to fit the Procrustean bed of "the desirability of tightening the law of insider trading" (70a).

The Second Circuit had, in the first place, no basis in Florida authority for assuming that a Florida court would have adopted *Diamond* as its rule of decision in this case. To justify its reliance for "persuasive authority" on *Diamond*, the Second Circuit relied on lower federal court cases

which say that a federal court, confronted with a question not passed upon by the courts of the state concerned, may reasonably assume that its courts would apply the "majority rule" (66a).* This Court has never sanctioned a method of finding state law which looks to the "majority rule", but even if that method were valid it would not justify the Court of Appeals' reliance on *Diamond* because *Diamond*, far from being a "majority rule", is the law of only one state—New York. In order to adopt *Diamond*, moreover, a Florida court would have had to overrule or distinguish the case of *Palma* v. *Zerbey*, 189 So. 2d 510, 511 (Fla. App. 1966), *cert. denied* 200 So. 2d 814 (Fla. 1966) and other cases cited therein, which require—unlike *Diamond*—that a corporation allege damage as well as wrongdoing to sustain a cause of action. *Compare Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956), holding that a federal court was required to follow two 1910 Vermont cases in the absence of any evidence that Vermont had changed her views in the interim even though courts in most other jurisdictions had done so.

Nor did the Second Circuit have a reasonable basis in either New York or Florida law to support its further assumption that either a New York court or a Florida court would extend *Diamond* to reach the non-profiting, non-fiduciary defendants in this case. *Diamond* was based on traditional equitable principles relating to the duties of a fiduciary and on equity's distaste for allowing a fiduciary to profit from his office. That rationale has no application to persons who are not fiduciaries and in the regulation of

* *Baxter* v. *Lancer Industries, Inc.*, 213 F. Supp. 92 (E.D.N.Y.), *appeal denied*, 324 F.2d 286 (2d Cir. 1963), and *Locke Mfg. Cos.* v. *United States*, 237 F. Supp. 80 (D. Conn. 1964).

whose conduct the corporation has no interest. To bring the third-party defendants here within the reach of *Diamond*, the Second Circuit in this case relied on the antitrust principle of tacit collusion* (to explain how the defendants could be charged with a common enterprise even though the complaints did not plead one), on the doctrine of corporate opportunity in a conspiracy context** (even though trading in its securities does not deprive a corporation of any profit and no conspiracy was here alleged), and finally, and most heavily, on the felt necessity of two circuit judges of the "strong desirability of tightening the law of insider trading" (70a), with liberal citation of *SEC* v. *Texas Gulf Sulphur*, 446 F.2d 1301 (2d Cir. 1971), and other cases arising under the federal securities acts. With the exception of *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927), which deals with the liability of a real estate broker who negotiates the purchase of property for himself instead of for his client, the law and policy of Florida are conspicuously absent from this elaborate structure. Even an admirer of the result in this case could hardly contend that it is what it is supposed to be—the law of Florida applied to the facts alleged in the *Schein* and *Gregorio* complaints.

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* *See American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), and other cases cited in the court's opinion at 67a.

** *See Oil & Gas Ventures-First 1958 Fund, Ltd.* v. *Kung*, 250 F. Supp. 744, 749 (S.D.N.Y. 1966), and cases cited by the court below at 68a.

B. By Using Florida's Certification Procedure, the Court of Appeals Could Have Found—Instead of Pretending to Find—Florida Law.

The difficulty of obeying *Erie's* command in cases where state law is genuinely confused or non-existent has long troubled the federal courts. Judge Clark of the Second Circuit termed this situation "without hesitation the most troublesome" consequence of the *Erie* decision. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie* v. *Tompkins*, 55 YALE L.J. 267, 290 (1946). In *Nolan* v. *Transocean Air Lines*, 276 F.2d 280 (2d Cir. 1960), Judge Friendly remarked:

> "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither of them has thought." 276 F.2d at 281.

After this Court remanded *Nolan* to the Second Circuit, 365 U.S. 293 (1961), to consider the effect of a new California decision, the Court of Appeals adhered to its original view but professed itself even more perplexed as to the state of California law. Judge Friendly said:

> "* * * [W]e should have been happier if the Court's mandate had allowed of some procedure to permit this recently created conflict between California dictum and California decisions to be settled by the only court that can authoritatively settle it, rather than requiring us to continue two-dimensional surmise." *Nolan* v. *Transocean Air Lines*, 290 F.2d 904, 905-06 (2d Cir. 1961).

See also Corneillier v. *American Casualty Co.*, 389 F.2d 641 (2d Cir. 1968); *Peterson* v. *Allcity Insurance Co.*, 472 F.2d 71 (2d Cir. 1972).

The same difficulty troubled this Court in *The Thungus* v. *Skovgaard*, 358 U.S. 588 (1959):

> "Yet the fact is that the New Jersey courts have simply not spoken upon the question of whether in a case such as this maritime law or common law is applicable under the State's Wrongful Death Act. * * * An effort to resolve that question here, no less than the effort of the Court of Appeals, could be nothing more than prediction, a prediction that might tomorrow be proved wrong by the courts of New Jersey, which alone have power to render an authoritative interpretation." 358 U.S. at 595.

Noting that the possibility of abstention by the federal court had not been raised or argued before the Court, Mr. Justice Stewart said that before disposing of the case in that way "important and competing jurisdictional considerations would have to be thoroughly evaluated"; consequently the Court would not disturb the New Jersey Court of Appeals' *en banc* interpretation of the New Jersey statute. 358 U.S. at 596.

The necessity of making a "prediction that might tomorrow be proved wrong" which troubled the Court in *Skovgaard*, and the unrealistic "two-dimensional surmise" which troubled Judge Friendly in *Nolan*, could have been avoided in this case by use of Florida's certification procedure. Indeed, it was this Court which, in response to the Fifth Circuit's profession of difficulty in deciding a Florida question, first directed the attention of the bench and bar to the existence of the Florida statute, passed in 1945 but never used until this Court's decision in *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960).

In *Clay*, the Fifth Circuit had found it unclear whether a Florida statute applied to a provision of the insurance policy in question, but held that application of the statute would in any event be inconsistent with due process. This Court reversed, directing the Fifth Circuit to determine the state law issue before reaching the constitutional question, but went on to propose that the Fifth Circuit resolve its Florida law dilemma by using the certification procedure:

> "But, as the Court of Appeals indicated, it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute. [Citations omitted.] The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision." 363 U.S. at 212.

Since *Clay*, this Court has twice used Florida's certification procedure to clear up unclear questions of Florida law, on both occasions to apparent good effect. In *Aldrich* v. *Aldrich*, 375 U.S. 249 (1963), certiorari had been granted to determine whether a West Virginia decision invalidating a provision of a Florida divorce decree complied with the Full Faith and Credit Clause. After receiving the Florida Supreme Court's response, this Court said:

> "Given the answers of the Florida court, it becomes plain that the judgment of the Supreme Court of Appeals of West Virginia, based as it was on a misapprehension of the law of a sister State, cannot stand." 378 U.S. 540, 543.

In the second case, Florida's answers to questions relating to the jurisdiction of her courts resulted in dismissal of this Court's writ of certiorari as improvidently granted: *Dresner* v. *Tallahassee, questions certified at* 375 U.S. 136 (1963), *certified questions answered,* 164 So.2d 208 (Fla. 1964), *petition for cert. dismissed,* 378 U.S. 539 (1964).

The Fifth Circuit since *Clay* has used Florida's certification procedure on several occasions* when the controlling state law question before it was both significant and unclear. In *Green* v. *American Tobacco Co.,* 304 F.2d 70 (5th Cir. 1962), *certified questions answered,* 154 So. 2d 169 (Fla. 1963), *after certification,* 325 F.2d 673 (1963), Judge Rives had occasion to thank Florida's Supreme Court for saving him from error in a case where the Florida answer turned out to be contrary to an opinion he had previously written for a divided panel of the Fifth Circuit but which had been withdrawn to permit certification. In *Martinez* v. *Rodriques,* 410 F.2d 729 (5th Cir. 1969), Judge Brown again praised the certification procedure: "Now the guesswork has been eliminated, and we are quickly presented with a definitive explication of Florida law." 410 F.2d at 730. *See also National Education Association, Inc.* v. *Board of Public Instruction,* 467 F.2d 447 (5th Cir. 1972).

The impact of certification was felt in *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375 (1970), where a federal remedy for death caused by unseaworthiness was estab-

* *See, e.g., Gordon* v. *John Deere Co.,* 451 F.2d 234 (5th Cir. 1971); *Allen* v. *Estate of Carman,* 446 F.2d 1276 (5th Cir. 1971); *A. R. Moyer, Inc.* v. *Graham,* 443 F.2d 434 (5th Cir. 1971); *Boyd* v. *Bowman,* 443 F.2d 848 (5th Cir. 1971); *Trail Builders Supply Co.* v. *Reagan,* 409 F.2d 1059 (5th Cir. 1969); *Gaston* v. *Pittman,* 405 F.2d 869 (5th Cir. 1969); *Life Ins. Co. of Va.* v. *Schifflet,* 370 F.2d 555 (5th Cir. 1967).

lished against a long line of contrary precedent. The Florida court had previously said, on questions certified to it by the Fifth Circuit, that its wrongful death statute provided no such remedy, 211 So. 2d 161 (Fla. 1968), thus answering for Florida the question which had troubled the Court under New Jersey law in the *Skovgaard* case. Florida's answer that its common-law remedy was not available framed the federal remedy issue more clearly for this Court by spotlighting "the incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy", 398 U.S. at 401 n. 15. By not employing Florida's certification procedure in this case, the Second Circuit did precisely what the Fifth Circuit avoided by using the procedure in *Moragne*: it forced upon Florida a remedy to effectuate a duty which had no discernible basis in Florida's law or policy.

This Court generally refuses to disturb the state law determinations of the lower federal courts, in part because in most cases the federal court is called to pass upon the law of the state in which it sits and is as well equipped as this Court to find state law, and in part because—short of abstaining altogether—there is no alternative. *See, e.g., MacGregor* v. *State Mutual Co.*, 315 U.S. 280 (1942); *The Thungus* v. *Skovgaard*, 358 U.S. 588 (1969). Neither of these considerations applies to this case. The Second Circuit, whatever its expertise in interpreting New York law, can lay claim to none in interpreting the law of Florida. Here, moreover, the federal judges who heard this case were evenly divided as to whether the complaints stated a claim for relief even under New York law, Judge Tyler in the District Court and Judge Kaufman in the Court of Appeals being strongly of the view that they did not. Nor is it necessary to accept the Second Circuit's result here as

the best the federal courts can do in an unclear state law situation. Certification offered the Second Circuit here an efficient means of obtaining an authoritative answer to its Florida law dilemma. "Informed local courts may find meaning not discernible to an outsider," *Louisiana Power & Light Co.* v. *Thibodaux,* 360 U.S. 25, 30 (1959). It was not for the Court of Appeals to assume that Florida had no answer to the question presented by this case; its duty was rather to invoke the procedure provided by Florida for supplying that answer.

II

Use of Florida's certification procedure in this case would have served compelling interests, not only of comity and equity, but of the federal court system as well.

In *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 80 (1938), this Court recognized that the federal courts, by making their own instead of following state law, had "invaded rights which in our opinion are reserved by the Constitution to the several States." *Erie* sought to end that invasion by laying down a rule of uniformity

> "* * * to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in a federal court should be substantially the same, so far as legal rules determine outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 109 (1945).

Erie's rule of uniformity, as restated by the Court in *Hanna* v. *Plumer,* 380 U.S. 460, 467-68 (1965), had the twin function

of avoiding both inequity in administration of the law and the kind of forum-shopping which had grown up under *Swift* v. *Tyson,* 16 Pet. 1 (1842). All of these concerns—equality of treatment under the law, the avoidance of forum-shopping and due regard for the role of the states as the primary expositors of state law—required the Second Circuit to use Florida's certification procedure in this case where the alternative, as the court's opinion plainly reveals, was a decision without any rational basis in Florida law at all.

A. Certification Assures Uniformity of Law.

Where state law is genuinely unclear, the federal court's decision is necessarily speculative, a "dubious and tentative forecast." *Louisiana Power & Light Co.* v. *Thibodaux,* 360 U.S. 25, 29 (1959); *accord, Chicago* v. *Fieldcrest Dairies,* 316 U.S. 168 (1942). Like any decision based on speculation, such a decision is unsound. It may also prove, upon a subsequent state court decision, to have been erroneous, with the consequence that rights of the parties in the federal case will have been determined by a different rule than that applied to others whose suits are brought in the state court.

The threat to uniformity posed by the prospect that the state court might reach a different conclusion is, of course, one of the primary considerations associated with this Court's abstention doctrine. In *Thompson* v. *Magnolia Petroleum Co.,* 309 U.S. 478 (1940), the Court held that a railroad's bankruptcy trustee should seek an Illinois determination as to whether the railroad or other claimants had the right to drill for oil under the railroad's right of way. The circumstance which impelled the Court to

reach this result was the difficulty of ascertaining Illinois law on the question, as evidenced by the fact that two federal Courts of Appeals had reached conflicting conclusions. The Court said:

> "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme." 309 U.S. at 484 (footnote omitted).

In *Louisiana Power & Light Co.* v. *Thibodaux,* 360 U.S. 25 (1959), the Court's decision upholding the District Court's decision to abstain as a matter of discretion rested on the twin circumstances of unclear state law (an unconstrued state statute and a state Attorney General's opinion questioning its validity) and an issue, touching on the power of eminent domain, which was of particular significance to the state:

> "A Louisiana statute apparently seems to grant such a power. But that statute has never been interpreted, in respect to a situation like that before the judge, by the Louisiana courts and it would not be the first time that the authoritative tribunal has found in a statute less than meets the outsider's eye. Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours." 360 U.S. at 30.

In *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968), this Court held unanimously that the lower federal courts had erred in refusing to abstain in a diversity action involving the right of a private business to condemn land to obtain access to water. That issue, as the Court said:

> "* * * is one of vital concern in the arid State of New Mexico, where water is one of the most valuable of natural resources. The question, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other business and landowners concerned with the use of this vital state resource." 391 U.S. at 594.

Subsequent events demonstrated the correctness of the Court's decision in *Kaiser,* for the outcome of the declaratory judgment proceeding in New Mexico's Supreme Court was indeed contrary to the Tenth Circuit's "prediction". *Compare Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970) *with W. S. Ranch Co.* v. *Kaiser Steel Corp.*, 388 F.2d 257 (10th Cir. 1968).

A certification procedure such as Florida's makes it possible for the federal court, in a case where state law is genuinely unclear, to give the litigants the benefit of the same rule which would be applied to others in the state court. Professor Kurland has written that certification offers "the greatest promise" for resolving troublesome state law questions in a definitive manner, thus better assuring "the equality of treatment which the *Erie* rule was

aimed to accomplish" without the separate lawsuit, delay and expense associated with abstention. Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases,* 67 YALE L. J. 187, 214 (1957).*

As certification avoids the threat of an inconsistent state determination, so it also affords a practical equivalent for something the accident of diversity jurisdiction otherwise takes away—the opportunity for authoritative review of the federal court's state law determination. A state trial court's determination on an important question of unclear state law may normally be tested in its intermediate and, ultimately, in its highest courts. In diversity cases there is no opportunity for such review and even the availability of review in this Court is severely limited by the Court's policy of not disturbing state law determinations made by lower federal courts: *see, e.g., Propper* v. *Clark,* 337 U.S. 472, 486-87 (1949); *Helvering* v. *Stuart,* 317 U.S. 154, 162-63 (1942); *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701, 707-08 (1949). In those situations where authoritative appellate review is most important—situations where, as here, state law on an important question of policy is unclear or non-existent—use of a certification procedure enables the federal court to achieve its purpose of sitting, in effect, as "only another court of the State. * * *" *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 108 (1945).

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* *See also* Note, *Consequences of Abstention by a Federal Court,* 73 HARV. L. REV. 1358, 1368-69 (1960); Kurland, *Towards a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine,* 24 F.R.D. 481, 489-90 (1960).

B. Certification Is a Protection Against Forum-Shopping

Hanna v. *Plumer,* 380 U.S. 460 (1965), requires uniformity of federal and state law as to any rule which would offer litigants in future cases an incentive to choose the federal over the state forum to litigate their local law claims. The present case presents an extreme example of the way in which a federal court's "state law" decision can create a lasting and even self-perpetuating incentive to future litigants to bring similar cases into the federal courts to avoid the possibility that the state might not follow the federal rule.

In this case, Maryland and Illinois stockholders sued in New York's federal court to enforce a state-law claim on behalf of a Florida corporation. What impelled these plaintiffs to choose a New York federal rather than a Florida state forum (perhaps the existence in New York of *Diamond* v. *Oreamuno,* on which their suit was frankly grounded and which has no counterpart in Florida, together with the Second Circuit's reputation for shaping the law of "tippee" liability) is less important than the effect the Second Circuit's decision in this case will have on the choice of forum of future litigants. Future suits against the "tippees" of Florida corporations are not likely to be brought in Florida's courts, where the law is uncertain or even in Florida's federal courts, since the Fifth Circuit would invoke Florida's certification procedure—such suits will be brought in the Second Circuit, where the corporation's claim against "tippees" has already been upheld. Nor is the benefit of the Second Circuit's rule in this case confined to Florida corporations, for it is evident from a reading of the court's opinion that the ma-

jority would like to and would reach the same result under the law of any other of the 49 states whose highest courts have never passed upon the "precise question" of whether a corporation can recover for "tippee" trading by non-profiting non-fiduciaries. As long as the requirements of diversity jurisdiction can be met—and in derivative litigation diverse stockholders usually can be found—every reason will exist for suits against "tippees" to be brought in the Second Circuit rather than in a state court which might rule the other way. A recent writer seems to take for granted that this case is "Second Circuit law":

> "* * * the major impact of *Schein* will be to give the Second Circuit a new weapon with which to police trading on the stock exchanges located in New York City. Shareholders should have no difficulty tracing trading of large blocs of shares by institutions just prior to public announcements having a major impact upon the stock's price. Once an out-of-state shareholder is located as party plaintiff on behalf of the corporation, the subject trader may be sued in New York by invoking diversity jurisdiction in a common law action based upon the principles of *Schein*." Note, 53 Boston U. L. Rev. 1150, 1159 (1973) (footnote omitted).

To the extent that the articulation by a federal court of a "state" right of action never upheld by the state encourages litigants to bring their cases to the federal courts,*

* We deal here with the forum-shopping which arises from a federal court's creation of a state right of action, but the same consequence ensues where a litigant who is able to invoke the diversity jurisdiction does so to take advantage of a restrictive state rule which the federal court is bound to apply, even though he knows the rule is outmoded and might well be overturned by the courts of his state if now challenged before them. See Note, *How A Federal Court Determines State Law*, 59 Harv. L. Rev. 1299 (1946).

Erie's goal of discouraging the choice of a federal forum to obtain a different rule of law is undercut. It is no attack on the diversity jurisdiction to insist that *Erie's* goal of uniformity be fulfilled, and artificial incentives for choosing the federal forum be reduced, by narrowing the range of uncertain state law as much as practicable. Certification is one desirable method of accomplishing this objective. Had the question of the sufficiency of the complaint in this case been certified to Florida's Supreme Court, and had that court answered the question in the negative, the harmful prospect of a string of Second Circuit cases holding "tippees" liable under "state law" would have been put to rest. By the same token, had Florida's court held that the complaints did state a claim for relief under Florida law, future litigants would have been assured that, from the standpoint of substantive law, they could just as well choose to sue in Florida's state as in New York's federal courts. They might still choose the federal forum, but at least an artificial incentive for that choice would have been removed.

While the right of litigants to avail themselves of the diversity jurisdiction for whatever purpose they choose cannot be questioned, the historic purpose of that jurisdiction—the protection of non-citizens against bias in state courts—does not warrant encouraging use of the federal courts to litigate what are essentially local issues, any more than it justifies incursion by the federal courts into the states' role of making state law. *Snyder* v. *Harris*, 394 U.S. 332, 341 (1969). The federal courts today are flooded with diversity litigation which detracts from their time and resources needed to deal with the federal constitutional

and statutory questions which are their paramount concern. Whichever way Florida answered the question, the federal court system as a whole would have benefited if the Second Circuit had stopped here to determine whether Florida recognizes the claim asserted in this case.

C. Certification Was Required in This Case in the Interests of Comity.

This case presented an important question of common law and an important policy choice for the state of Florida in an area in which state policy is unquestionably supreme, that of defining and regulating the duties of fiduciaries to corporations formed under its law. The Second Circuit decided that question, and made that policy choice, without guidance in Florida's law, by infusing its view of federal securities law policy objectives into the precedent-breaking New York rule of *Diamond*. In so doing, the Second Circuit unnecessarily invaded Florida's interest in remaining the primary expositor of its law.

The "desirability of avoiding unseemly conflict between two sovereignties, [and] the unnecessary impairment of state functions * * *" have long been recognized as among the concerns which may require a federal court to stay its hand. *Martin* v. *Creasy*, 360 U.S. 219, 224 (1959). While abstention, since *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), has been most commonly associated with the avoidance of premature constitutional decisions, the author of the *Pullman* decision, dissenting in *Propper* v. *Clark*, 337 U.S. 472 (1949), made it clear that respect for the proper role of the state was equally important to the *Pullman* rationale. Mr. Justice Frankfurter said:

> "It is true that in all but one of these [abstention] cases recourse to the State courts also served the purpose of avoiding what might have been an unnecessary decision of a constitutional issue. * * * Even more fundamental, however, was recognition of the importance of maintaining harmonious relations between parallel systems of State and federal courts in a situation where, because State law controlled, the State courts had the last word and so a federal court at best could make only an informed guess. That this was a dominant consideration in the mind of the Court appears plainly in the language of its opinions." 337 U.S. at 494-95.

He concluded:

> "So here, though no constitutional issue is present, regard for the respective orbits of State and federal tribunals is the best of reasons, as a matter of judicial administration, for requiring a definitive adjudication by the New York courts rather than proceeding on the basis of our own tentative guess as to the meaning of the New York statutes." 337 U.S. at 497.

The importance of avoiding "needless friction with state policies" was the primary reason for abstention in *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, 172 (1942). That case involved the possible conflict between a state statute and a city ordinance regulating the form of milk containers, an issue on which the Supreme Court of Illinois had the final word. The constitutional issue, if not insubstantial, was very much in the background. Mr. Justice Douglas' opinion for the Court rested squarely on the ground of comity:

> "Considerations of delay, inconvenience and cost to the parties, which have been urged upon us, do not

> call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole." 316 U.S. at 172-73.

See also Louisiana Power & Light Co. v. *Thibodaux*, 360 U.S. 25, 29 (1959); *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968).

A state's policy can be disturbed in other ways than by an injunction against its officers or a declaration that a statute is unconstitutional. The instant case is an example of just such interference, for in this case a "state" right of enormous impact has been created for Florida by a distant federal court whose deference to Florida law and policy was no more than formal. The opportunity of Florida's Supreme Court to correct the Second Circuit's error (as we believe it was) in a future case does not make up for the intrusion into her affairs represented by this decision. That opportunity, moreover, as a result of the Second Circuit's decision is more fiction than fact, since future plaintiffs have every reason to bring their claims to the federal courts of the Second Circuit rather than to Florida which might not sustain them. Florida's Legislature, by enacting the certification procedure, expressed its distaste for having important questions of Florida law decided by the federal courts and at the same time offered to relieve the federal courts of that difficult task.* The Second Circuit should have respected Florida's preference.

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* According to a Florida commentator, Florida's adoption of the certification procedure in 1945 was "probably a reaction" to this Court's decision in *Meredith* v. *City of Winter Haven*, 320 U.S. 228 (1943). Note, *Florida's Interjurisdictional Certification: A Re-examination to Promote Expanded National Use*, 22 U. FLA. L. REV. 21, 27 (1969).

Harmony in federal-state relations means more, in any event, than the mere avoidance of gratuitous interference with state policy, and certification is a better means than abstention for achieving the larger goal of what has been termed "cooperative judicial federalism", making the best use of the "special expertise of each of two judicial systems" while at the same time "[economizing] on the use of the systems so that one lawsuit will suffice to dispose of the problem rather than permitting two with the possibility of conflicting results as well as multiple costs." Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1959); *see also* Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. Rev. 841, 867 (1972). Its use here would have been especially appropriate, for here, as in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), the very fact that federal statutory policy may have overlapping concerns makes it all the more important that the state issue not be decided by looking through the federal lens.

D. Certification Is a Better Answer Than Abstention to the Unclear State Law Problem.

This Court has repeatedly held that abstention, as an escape from the duty of a federal court to decide a case properly before it, is appropriate only in narrowly-defined special circumstances which justify "the delay and expense to which application of the abstention doctrine inevitably gives rise," *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 418 (1964); *see also Kusper* v. *Pontikes*, 94 S. Ct. 303, 306 (1973); *Lake Carriers' Association* v. *MacMullan*, 406 U.S. 498, 509 (1972). Recognizing

that both the impairment of federal jurisdiction and the delay and expense associated with abstention are substantially alleviated when a certification procedure is available, many commentators have urged the states to enact such legislation as a means of reducing the costs of abstention decisions.* Mr. Justice Douglas, dissenting in *England*, suggested certification as a means of making abstention decisions less cumbersome:

> "Another alternative is for the District Court to follow the certificate route, when one is available. The Florida Supreme Court is authorized to provide by Rule for answering certificates concerning state law questions tendered by the federal courts. We use that procedure on Florida state law perplexities [citations omitted]. We cannot require the States to provide such a procedure; but by asserting the independence of the federal courts and insisting on prompt adjudications we will encourage its use." 375 U.S. at 433-34 (footnote omitted).

Certification is a valuable tool for assisting the federal courts in their task of finding and applying state law, and there is no reason to confine its use to cases in which abstention would otherwise be necessary. Its use should

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* *See, e.g.*, Note, *Certifying Questions to State Supreme Courts: As a Remedy to the Abstention Doctrine*, 9 S. DAK. L. REV. 158 (1964); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963).

Five states besides Florida now have certification procedures: HAWAII REV. STAT. §§602-36, 37 (1968); ME. REV. STAT. ANN. tit. 4, §57 (Supp. 1970); ME. R. CIV. P. 76B; MONT. SUP. CT. R. 1; N.H. REV. STAT. ANN. ch. 490; APP. R. 21, §1 (1968); WASH. REV. CODE ANN. ch. 2.60.020 (Supp. 1969). The National Conference of Commissioners on Uniform State Laws has recommended, and the American Bar Association has recommended enactment of all states of a Uniform Certification procedure: UNIFORM CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE].

be sanctioned whenever state law on a significant question appears truly unclear or non-existent, and should be required in those infrequent cases where, as here, the federal court's alternative is to abandon state law altogether.

1. Certification Does Not Deprive Any Litigant of a Federal Forum.

Meredith v. *City of Winter Haven*, 320 U.S. 228 (1943), was a suit by non-citizen bondholders attacking the validity of the city's plan to retire a bond issue without payment of deferred interest coupons. The District Court dismissed the complaint for failure to state a claim and because the controlling state law question had been decided adversely to similarly-situated bondholders by the Supreme Court of Florida in another case. The Fifth Circuit was of the view that Florida law was uncertain, apparently because it thought Florida might not adhere to its prior decision, and directed that the complaint be dismissed without prejudice to the rights of the parties to bring a declaratory judgment suit in Florida. This Court reversed, saying:

> "While the rulings of the Supreme Court of Florida in the *Andrews* case must be taken as controlling here unless it can be said with some assurance that the Florida Supreme Court will not follow them in the future (citation omitted), we assume, as the Court of Appeals has indicated, that the Supreme Court of the State may modify or even set them aside in future decisions. But we are of the opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision." 320 U.S. at 234.

Insofar as *Meredith* holds that a federal court may not close its doors because of the mere prospect that a state court might change its rule in the future, its validity today is unquestioned, for this Court has consistently recognized that the first requisite of abstention is an issue of genuinely unclear state law. *See, e.g., Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 186 (1959); *Harman* v. *Forssenius*, 380 U.S. 528, 534-36 (1965). Nor do we suggest that certification is appropriate in a case where state law can be determined from existing precedent, as the Fifth Circuit has recognized: *Greer* v. *Associated Indemnity Co.*, 371 F.2d 29, 30 (5th Cir. 1967); *Vandercook & Son, Inc.* v. *Thorpe*, 344 F.2d 930, 931 (5th Cir. 1965).

It cannot be supposed, however, that *Meredith* limits a federal court's use of Florida's certification procedure to cases in which abstention would otherwise be necessary. No such limitation was expressed by the Court in *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), when it suggested that the Fifth Circuit resolve its Florida law dilemma by use of the certification procedure. In *Aldrich* v. *Aldrich*, 375 U.S. 249 (1963), and *Dresner* v. *Tallahassee*, 375 U.S. 136 (1963), this Court used the certification procedure simply as a tool for finding Florida law, as the Fifth Circuit has done in recent years to resolve a variety of Florida questions which, had the certification procedure not been available, would probably have been decided by the court without abstention. *See, e.g., Green* v. *American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963); *Hopkins* v. *Lockheed Aircraft Corp.*, 394 F.2d 656 (5th Cir. 1968).

Implicit in this Court's and the Fifth Circuit's use of certification as a tool for finding Florida law is a recognition

that certification does not, as did the form of abstention the Court refused to countenance in *Meredith,* require the federal court to refuse to entertain an action properly before it. Nor does certification result, as have most abstention decisions in recent years, in sending the parties to the state courts for separate adjudication of so much of their dispute as involves state claims.

In *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415 (1964), this Court said that there were "fundamental objections" to any conclusion that a litigant having properly invoked the federal court's jurisdiction could be compelled to accept a state court's determination of his claims instead. Review from the state decision, this Court held, was not an adequate substitute for "the benefit of a federal trial court's role in constructing a record and making fact findings." 375 U.S. at 416. Florida's certification procedure fully accomplishes *England's* mandate.* The federal district court remains the trier of fact and the source of the initial decision. The Court of Appeals, if it finds the district court's decision to have been controlled by a question of unclear Florida law, can certify that question directly to Florida's Supreme Court. The submission by a federal Court of Appeals of a question of law, framed by it on stated facts—or in this case, on the allegations of a complaint—is scarcely a surrender of federal judicial authority, for the state and not the federal court has the primary interest in deciding that question in the first place, and the litigant seeking to en-

* *See* Liebenthal, *A Dialogue on England: The England Case, Its Effect on the Abstention Doctrine, and Some Suggested Solutions,* 18 W. Res. L. Rev. 157, 201 (1966).

force a state-created right in the federal court is entitled to no more than the rule of law which would be applied by the state.

2. *The Benefits of Certification Outweigh the Small Amount of Delay and Expense It Adds to the Proceeding.*

In the usual abstention case, the parties are directed to commence a state declaratory judgment or other action to obtain a determination of the uncertain state question. Members of this Court have frequently protested the multiplied costs, and the protracted delay, which can result from this procedure. *See, e.g., Harrison* v. *NAACP,* 360 U.S. 167, 180 (1959) (dissenting opinion of Mr. Justice Douglas). Certification is not, of course, free from delay or expense. The added expense, however, is not that of a separate lawsuit, but rather of an extra set of briefs. The added delay is not the years which may be consumed in starting a separate suit and having it proceed through the state's trial and appellate courts, but the months which are typically required to obtain an answer directly from the state's highest court. The Fifth Circuit has commended the efficiency with which Florida's Supreme Court answers questions certified to it: *Martinez* v. *Rodriques,* 410 F.2d 729 (5th Cir. 1969); *National Education Ass'n, Inc.* v. *Board of Public Instruction,* 467 F.2d 447, 449 (5th Cir. 1972). A detailed study of the time consumed by certification procedures, *The Case For Certification,* 12 Wm. & Mary L. Rev. 627, 647 (1971), demonstrates that Florida, which has more experience than other states with this procedure, by 1969 and 1970 had reduced the average time consumed in furnishing answers to certified questions to 221

days, or some seven months. The cost of a seven-month delay, in an appropriate case, is well worth the benefits received.

Conclusion

The Second Circuit Court of Appeals' decision in this case should be reversed and the Court of Appeals should be directed upon remand to certify the controlling question of law presented herein to the Supreme Court of Florida.

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